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CURRENT EVENTS.

INEXPERIENCED PROSECUTING ATTORNEYS.—A little inquiry will show that in Missouri, Illinois, and other Western States, the office of prosecuting attorney is in many cases—perhaps in most cases—filled by young lawyers who are just out of the law schools, or who have just been admitted to the bar. The number of reversals in criminal cases by the courts of last resort is, in these States, a perpetual scandal to the administration of justice, and a continued incitement to mob violence. We believe that one of the chief causes of this deplorable result is the general inefficiency of the prosecuting attorneys. The cause of the general inefficiency of the prosecuting attorneys need not be much sought after. It will be found in the inconsiderable salaries allowed to those officers. We are glad to see that this subject has lately received attention from a high source. Hon. David Davis, lately a justice of the Supreme Court of the United States and President of the Senate, filled during the last year the presidency of the bar association of Illinois. In his annual address before the meeting of that body which took place in January, he alluded to this subject as follows:

"It is manifest that in order to insure a faithful administration of criminal justice, the public should be better served than they are at the present time. Sagacious men, when their business affairs become the subject of judicial investigation, employ the ablest lawyers in the profession, and the defendant in an indictment for a serious offense, if he is able to do it, always pursues the same course. Surely society, which represents the aggregate interest of all, should not depart from this wise course of individual action. It is a false economy to pay small salaries to public prosecutors, and thus compel the people to employ young and inexperienced lawyers. No one should be eligible to the office of prosecuting attorney until he has had a certain number of years of training at the bar. Frequently, in the immature and incompetent years of their professional life, lawyers seek the office for the small emolument it confers, and after they have acquired the proficiency incident to experience, resign their trust, and engage in more lucrative practice. In this way the public suffers, and criminals who ought to be convicted are acquitted. If the compensation were placed on a basis to command the best talent of the profession, justifying the officer in making the office the principal business of life, much of the complaint now existing against the inefficiency of the administration of criminal justice would disappear. The importance of preliminary examinations before magistrates will be conceded by all lawyers, and if the prosecuting officer were required to attend them, when practicable to do so, and see that the strict rules of evidence were applied in the investigation, many criminals who now escape would be held for trial, and many suspected persons, who could not be convicted, but are recognized to appear at court, would be discharged. This would also be the case, if the officer, in the discharge of his duty, always assisted and advised the grand jury, in the business before them. This duty is sometimes neglected, and indictments are found having no competent proof to sustain them, which is a great wrong to the individual, and to the public. Besides, grand juries often fail to find "true bills" where a trained lawyer, who heard the evidence, by his exposition of the law, would indicate a different result. There should be some degree of permanency in the office of prosecuting attorney, and I know of no better mode of securing this than to lengthen the term of service. If this were done, and, as I have suggested, the salary increased, a better grade of lawyers would willingly take the place, and, even if inexperienced in criminal practice, would soon fit themselves for the position. I indulge in this line of thought because of the recent manifestations of violence in different sections of the country, growing out of the imperfect execution of the criminal law."

JUDICIAL WORKSHOPS.—The Montreal *Legal News* has the following:

The buildings provided for judges and lawyers to do their work in, are seldom all that could be desired. In England Mr. Justice Stephen loses his way in the intricate and confused maze of the new law courts. 7 L. N. 256. The St. Louis Court House has become an unsavory refuge for tramps. 7 L. N. 89. Chicago also boasts a new court house, but it is so unsatisfactory that the Chicago *Legal News* recently mentioned the following fact in reference to it: "A few days ago, one of the best judges on the bench said, 'My court room is dark, and I have to burn gas most of the time. The air heated by the burning gas is extremely injurious to my health. I feel that I am breaking down from this cause, and at the expiration of my term next year, I shall resume my practice at the bar.'" Thereupon Mr. J. A. Crain, a lawyer of Freeport, sends the following suggestion to the editor: "For twenty years I have had over each gas-burner in my office, a pipe leading into a chimney, which pipe carries off all

heat and noxious effects of the gas when burning. Tell the judge mentioned in *Legal News* of the 18th, and oblige."

The open halls in the wings of the St. Louis Court House, where the tramps used to sleep in the winter as well as in the summer, have lately been nicely boarded up by the new Superintendent of Public Buildings, so that the tramps are now limited to summer dreams on the east and west fronts behind the great Corinthian pillars. The hitherto open spaces in the wings are now enclosed halls. But the porous stone floors, having absorbed the filth deposited by generations of tramps, smell like the assembled plagues of Egypt. And when we say a thing smells badly in St. Louis, we necessarily mean a great deal. St. Louis itself, whether with reference to its air, its water, or its mud, must be set down as a city of cosmopolitan filth. Not Babylon, nor great Alcairo, such fragrance equalled in their glories. Lisbon, at the beginning of this century, could not have been much worse; and what Lisbon was, has thus been put in immortal verse:

"But whoso entereth within this town,
That, sheening far, celestial seems to be,
Disconsolate will wander up and down
Mid many things unsightly to strange e'e;
For hut and palace show like filthily
The dingy denizens are reared in dirt;
Ne personage of high or mean degree,
Doth care for cleanness of surtout or shirt,
Though shent with Egypt's plague, unkempt, unwashed, unhurt."

In addition to the other sweet smells of the St. Louis Court House, we may allude to one which is a peculiar luxury, on account of its health-giving influence. It is well known that *ammonia* is healthy—that it is hostile to the germ life which is the purveyor or cause of disease. For many years the square which surrounds the Court House in St. Louis, has been the stand established by city ordinance for hacks and hackney coaches. These vehicles with their horses occupy their official stand from early morning until late night. Some of them stand immediately under the windows of the chambers of the judges of the courts, and those laborious gentlemen enjoy, in summer, the luxury of living in the second story of a livery stable. Would it not be just to remove the official hack-stand from the Court House to the City Hall—to put a segment of the out-door stables under the Mayor's office? The smell would be beneficial to his health, and the Council and House of Delegates would enjoy it in their nocturnal meetings in summer.

NOTES OF RECENT DECISIONS.

MALICIOUS PROSECUTION—PROBABLE CAUSE NOT A QUESTION FOR THE JURY.—In *Tolman v. Phelps*,[1] the Supreme Court of the District of Columbia held that in an action for malicious prosecution, it is error to leave to the jury the determination of the question whether the defendant had probable cause for the prosecution complained of. It is the duty of the court to instruct the jury what facts, if proved, would constitute such probable cause; and it is the province of the jury to determine whether such facts are established by the testimony. In giving the opinion of the court, Mr. Justice James said: "The law in this respect was settled by this court in another case;[2] it is not necessary to go into authority beyond that. It is settled here, and everywhere, that it is for the court to tell the jury what facts would constitute probable cause. Substantially, the court only told the jury the rule of law, that probable cause was what a reasonable, intelligent man would think justified him in making the charge. It is not everybody who is supposed to know, neither prosecutor nor jury, what facts make up a crime, and therefore it is necessary that the court should tell the jury what facts justify a person in alleging crime. The court did not follow that course, but really gave the jury to suppose that they might examine all that testimony and make up their own minds as to what would constitute probable cause."

EXPERT TESTIMONY—OPINION AS TO A PERSON BEING ANGRY.—In *State v. Shelton*,[1] it was held proper, on a trial for murder, to ask a non-expert witness whether the defendant, on a certain occasion, manifested any anger; and it was held proper, against the objection of the defendant, to allow the witness to tes-

[1] 12 Wash. Law Rep. 587.
[2] Coleman v. Heurich, 2 Mackey, 189.

[1] 20 N. W. Rep. 459, 462.

tify that the defendant looked angry. In giving the opinion of the court, Reed. J., said: "One of the rules laid down by Mr. Lawson, in his recent valuable work on Expert and Opinion Evidence, is that 'the physical or mental condition, or appearance of a person, or his manner, habit, or conduct, may be proven by the opinion of an ordinary witness, founded on observation,' (rule 641, p. 464); and this rule is well settled by the authorities. Under it, it was competent for the witness to state what, in his opinion, the mental condition of the defendant was on the occasion in question, as indicated by his conduct and appearance."

NEGLIGENCE — PROXIMATE AND REMOTE CAUSE.—In the case of *Texas Pacific R. Co. v. Anderson*,[1] the Court of Appeals of Texas quoted with approval the following definitions of proximate and remote cause as found in recent works: "A long series of judicial decisions has defined proximate or immediate and direct damages to be the ordinary and natural results of the negligence, such as are usual, and as, therefore, might have been expected; and this includes in the category of remote damages such as are the result of an accidental or unusual combination of circumstances which would not reasonably be anticipated, and over which the negligent party has no control. But there can be no fixed and immediate rule upon the subject that can be applied to all cases. Much must, therefore, as has been often said, depend upon the circumstances of each particular case.[2] Whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, if such intervening causes were set in motion by the original wrong-doer.[3] Where there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect and proximate to it."[4]

Applying this principle, the Texas court hold, in a very clear opinion, by Willson, J., that if a railway train rapidly approaches a crossing without the ringing of the bell, or the sounding of the whistle, whereby a traveller who is journeying on the highway near the crossing is surprised and his horses so frightened that they run away and overturn his vehicle, the negligence of the servants of the railway company is the proximate cause of the injuries thus sustained.

[1] 4 Texas L. Rev. 211.
[2] 2 Thomp. Neg. p. 1083, note § 1.
[3] 2 Thomp. Neg. p. 1084, § 2; Addison on Torts, 5.
[4] Field on Dam. p. 705.

CHARGING JURIES.—It is of course the duty of the judge, when requested, to lay down the law to the jury, touching every hypothesis of fact presented by the evidence. But it is often a question of much perplexity what degree of probability must support the hypothetical state of facts in order to require the judge to instruct the jury with reference to it. Upon this point there seem to be two ideas. One is that if there is *any* evidence, however slight,—even a *scintilla*, as it is sometimes called—tending to show a certain state of facts, the judge is bound, if requested, to instruct the jury with reference to the law applicable to those facts. By necessary analogy, where this idea prevails, a verdict of the jury will not be set aside on appeal or error if there is a *scintilla* of evidence to support it; for it is an unavoidable conclusion that the judge is bound, if requested, to charge the jury upon any hypothetical state of facts presented by evidence of sufficient force to support a finding of the jury in favor of the existence of those facts. The other idea is that, in order to make it obligatory upon the judge to lay down the law to the jury with reference to a hypothetical state of facts, there must be evidence tending to show such facts sufficiently strong to require the judge to allow the verdict to stand if rendered in favor of the existence of such facts, on a motion for new trial, where he decides in the exercise of a sound discretion, and not within the restricted limits which courts occupy on appeal or error. In other words, according to this doctrine the judge is not bound to instruct the jury with reference to the state of facts, unless there is evidence making it *in some degree probable* that such facts exist. This doctrine is much more consistent with sense and conducive to justice than the *scintilla* doctrine. In a Texas case it was thus

laid down by Chief Justice Roberts, himself an able and experienced judge:

"When the evidence tends sufficiently to the establishment of a defense, or mitigation of the offense charged, as to reasonably require a charge as applicable, is a question of sound judgment to be exercised by the district judge in the first instance, and afterwards by the Supreme Court on appeal. If its force is deemed to be very weak, trivial, light, and its application remote, the court is not required to give a charge upon it. If, on the other hand, it is so pertinent and forcible as that it might be reasonably supposed that the jury could be influenced by it, in arriving at their verdict, the court should charge so as to furnish them with the appropriate rule of law upon the subject."[1]

This doctrine has lately been re-affirmed and applied by the Court of Appeals of Texas.[2]

[1] Bishop v. State, 43 Texas, 390, 402.
[2] Elan v. State, 4 Texas Law Rev. 217.

JUDGE MCCAY.—Hon. Henry M. McCay, Judge of the District Court for the Southern District of Georgia, was recently attacked with a temporary aberration of the mind whilst in the performance of his judicial duties. He was removed to the residence of his brother, Prof. McCay, of Baltimore, Md., by whom he was afterwards placed in a Pennsylvania hospital for the insane. After being so confined, Judge McCay went with Dr. Brush, the attending physician, before Mr. Valentine, the U. S. District Attorney, where he complained that he was unjustly detained of his liberty, and stated that he desired to present to the United States District or Circuit Court a petition for a *habaes corpus*. He stated that he had been unjustly confined in the hospital at the instigation of some members of his family, and that he had more sense than those who had put him there. He exhibited a petition setting forth that he was a citizen of Georgia, unjustly confined by Dr. John B. Chapin, a citizen of Pennsylvania, and praying for a writ of *habeas corpus*. Mr. Valentine conducted his visitors before Judges McKennan and Butler and explained the case. The latter supposed that all that was wanted was that the court should look into the matter. Judge McCay replied that that was all he wished, as he did not desire to scandalize the institution or criticise its management, as it was well enough in its way. All he desired, however, was his liberty, and he thought as a citizen of a foreign State he could properly bring the matter before the United States Court and claim its protection. He asked that the physicians who examined him, and upon whose certificate he had been committed to the asylum, be subpoenaed, and that the hearing be given as privately as possible, as he did not wish to give publicity to the proceedings. The court stated that they would dispose of the matter on Thursday in chambers. With this understanding, the petitioner departed with his medical custodian. Of course the Federal judges decided that they had no jurisdiction. The fact that an experienced Federal Judge should have supposed that citizenship in a foreign State gives jurisdiction to a Federal court or judge to examine into the grounds of a prisoner's detention, on *habeas corpus*, was in itself, evidence of mental unsoundness. At least, it would have been, if two Federal judges had not decided that such jurisdiction exists, on the ground of non-residence, in cases which concern the custody of children.[1] On a subsequent day, Judge McCay, as we learn from a press dispatch, sought the aid of the Court of Common Pleas, in his endeavor to be released from the Pennsylvania Hospital for the Insane. He retained Rufus R. Shapley to plead his cause, and on application to Judge Finletter, a writ of *habeas corpus* was issued. Subsequently Mr. Shapley was informed that the hospital authorities had granted Judge McCay the privilege to go and come as he pleased. Of this fact the lawyer had an ocular demonstration soon after, when he found his client at his office with a pass key to the hospital in his pocket. The Judge told Mr. Shapley the story of his prostration from overwork. Though he admitted that he had done many eccentric things, he claimed to be perfectly sane. He had suffered much physical pain, and upon one occasion he did immerse his feet in water while upon the bench, as that gave him relief from a sensation of pain which extended over his entire body. This incident of his failing strength, like

[1] United States v. Green, 3 Mason, 482; Bennett v. Bennett, Deady, 299. *Contra*, *Ex parte* Evarts, 1 Bond, 197; Barry v. Mercein, MS., Southern Dist. N. Y., Betts, J.

many others, had been greatly exaggerated by the press of the country. But the hospital authorities were now satisfied that he was not a proper subject for restraint. Judge McCay added that he was willing to remain at the hospital under the existing terms, until his health was restored, and he left his attorney with the understanding that the writ of *habeas corpus* would be withdrawn.

MUNICIPAL CORPORATIONS.—LIABILITY FOR TRESPASSES.—We do not believe that the doctrine laid down by the Court of Appeals of Texas, in *City of Dallas v. Ross*,[1] will work. It was held that, in an action against a municipal corporation for a trespass upon the plaintiff's land, the petition is bad on demurrer unless it alleges that the act done was "within the scope of the corporate powers as prescribed by charter or positive enactment." Aside from the fact that the defendant, by its answer, helped out the plaintiff's petition by alleging facts which, if true, showed that the ditch, the digging of which constituted the trespass, was such a ditch as the city had, under its charter, the authority to dig; and that the plaintiff's petition was aided by a verdict, it seems very doubtful, upon principle, whether a party suing a municipal corporation for a trespass is bound to allege that the act done by the servant or agent of the corporation was within the scope of the corporate powers. We do not recall any case where such a rule of pleading has been laid down. If it is a good rule in respect of an action for trespass upon land against a municipal corporation, it is an equally good rule in respect of a similar action against a private corporation. It is laid down by an eminent author that, in order to make a corporation liable for a tort of its officer, "it is fundamentally necessary that the act done which is injurious to others must be *within* the scope of the corporate powers as prescribed by charter or positive enactment; * * * * in other words, it must not be *ultra vires*, in the sense that it is not *within* the power or authority of the corporation to act in reference to it under any circumstances. If the act complained of lies *wholly outside* of the general or special powers of the corporation, as conferred by charter or statute, the corporation can in no event be liable, whether it directly commanded the performance of the act, or whether it be done by its officers without its express command; for a corporation cannot, of course, be impliedly liable to a greater extent than it could make itself by express corporate vote or action."[2] This is true;[3] but it is true only in the sense that the act done must have lain somewhere within the general limits of the power conferred upon the corporation by the charter or statute. If it lies entirely outside of such limits, it is not, in legal contemplation, the act of the corporation; and, *e converso*, if it is the act of the corporation, it necessar ly lies within those limits. When, therefore, the act done is charged in the petition or declaration as the act of the corporation, it necessarily means that it was then done by some one acting for it within the general scope of its powers; and the further allegation of this fact would be useless tautology. Indeed, it would be an allegation which would require a further qualification in order to make the pleading good; for the powers of a corporation are conferred by law, and when it is averred that an act is done within the scope of such powers, a necessary implication follows that the act was lawful, unless the pleader further states that the powers were wrongfully exercised, and points out wherein they were wrongfully exercised. The distinction is similar to that which exists in respect of courts of justice, between the want of jurisdiction and error in the exercise of jurisdiction. If there is no jurisdiction, there is no court in respect of the particular proceeding, and it is said to be *coram non judice*. But a judgment may be within the jurisdiction of the court which rendered it,—that is to say, within the scope of its powers,—and yet erroneous, and hence wrongful and subject to be corrected. So, in respect of a corporation; if an act imputed to it as a wrong lies wholly within the scope of its powers, in respect of that act there is

[1] 4 Tex. L. Rev. 146.

[2] Dillon on Munic. Corp. (3 Ed.) § 968.

[3] Schumacher v. St. Louis, 3 Mo. App. 298, per Lewis, P. J.; Anthony v. Adams, 1 Metc. 284, 286; Albany v. Cunliff, 2 N. Y. 165 (reversing 2 Barb. 190). See Stetson v. Kempton, 13 Mass. 272; Norton v. Mansfield, 16 Mass. 48; Parsons v. Goshen, 11 Pick. 396.

no corporation, and the remedy to the injured person is against the individual wrong doer. But the act may lie within the general scope of the powers of the corporation, and yet those powers may be wrongfully exercised by the officer or agent appointed by the legislative or executive authority of the corporation to exercise them, in which case, the corporation is held bound to repair the wrong in damages.[4] No mere technical departure from the mode in which the charter or statute directs the power to be exercised, discharges the corporation from liability.[5] To illustrate: If a corporate vote is necessary to empower the selectmen of a town to do a certain act, and they do it without a corporate vote, and damage ensue, the town is not liable. So, if a municipal corporation have no power to build a bridge, but, nevertheless, undertake to do it, and damage ensue, it is merely the wrong of those who assume to act in its name.[6] But if a municipal corporation have power to construct a bridge, and so construct it as to obstruct the stream, and to injure a riparian owner, it must answer to him in damages.[7] In the Texas case, on which we are commenting, the answer was, that the municipal corporation had power to build sewers, drains, etc. The injury complained of was the digging of a ditch across the plaintiff's lot. The pleadings, taken together, therefore show that the thing complained of as a wrong, lay within the general scope of its powers, and, hence, the conclusion of the court seems quite untenable.

POWERS OF BANK CASHIERS.

I. *Their Powers Generally Considered.*

Status of the Cashier.—The cashier is the chief executive officer of a bank. He is the manager of its concerns in all things not peculiarly committed to the directors, and is the agent, not of the directors, but of the corporation.[1]

Powers Classified.—The powers of cashiers may be said to be resolvable into three general classes: *First*, such as are inherent in the office, and which cannot be denied by the bank unless it be shown that their want was known to the other contracting party at the time of the transaction. *Second*, such as are presumed to have been conferred on him, but which may be shown, in any case not to have been so conferred; and, *Third*, such as are exercised only by virtue of special authority granted by the directors.

Classes Considered.—It is very difficult—perhaps impossible—to define with great precision or definiteness what is embraced in each of these several clases, but it may be said, in a general way, that a cashier has inherent power to do, as the executive officer of the bank, all such things as come within the ordinary course of his duties, or, in other words, within the scope of the general usage, practice, and course of business conducted by the bank.[2]

He has *prima facie* power only to do those things without the ordinary course of his duties which it would seem he should do, and which therefore the law presumes him authorized to do, until the contrary appears.

Special authority from the directors is essential where the act is not only without the ordinary course of his duties, but is within the legislative and judicial province of the directors, and is of a character which renders it improbable that he should have general authority to do acts of the like kind.[3]

This authority may be either expressly or impliedly conferred; and this, although the charter and by-laws require the directors to prescribe the duties of the officers.[4] It may be expressly conferred, for example, by resolution of the board of directors; and impliedly, for instance, by their acquiescence in

[4] Schumacher v. St. Louis, 3 Mo. App. 298; Thayer v. Boston, 9 Pick. 511; Lee v. Sandy Hill, 40 N. Y. 442.
[5] Pekin v. Newell, 26 Ill. 320; Schumacher v. St. Louis, 3 Mo. App. 298.
[6] Albany v. Cunliff, 2 N. Y. 165 (reversing s. c. 2 Barb. 190).
[7] Lawrence v. Fairhaven, 5 Gray, 110; Stone v. Augusta, 46 Me. 127.

[1] Bissell v. First Nat. Bank, 69 Pa. St. 415; Bank of Kentucky v. Schuylkill Bank, 1 Pars. Sel. Cas. 180.

[2] Lloyd v. West Branch Bank, 15 Pa. St. 172; Matthews v. Massachusetts Nat. Bank, 1 Holmes, 396; Neiffer v. Bank of Knoxville, 1 Head, 162; Minor v. Mechanics' Bank, 1 Pet. 46; Wakefield Bank v. Truesdell, 55 Barb. 602; United States v. City Bank, 21 How. 356.
[3] Bank of East Tennessee v. Hooke, 1 Coldw. (Tenn.) 156; Rhodes v. Webb, 24 Minn. 292; Bank of Comrs. v. Bank of Buffalo, 6 Paige, 497; Percy v. Millandon, 3 La. 568.
[4] Durkin v. Exchange Bank, 2 Patt. & H. 277.

the performance of similar acts, or by ratification of the particular act, as by availing themselves of the benefit of the transaction.[6]

If such authority be conferred, acts of the cashier in pursuance of it, say some courts, will be binding on the bank, although in violation of the law of its existence.[6]

II. *Their Powers Specifically Considered.*

The foregoing general propositions will have illustration in the following specific statement of the powers of cashiers.

Power to Receive and Pay.—As is obvious, it is among the inherent powers of a cashier, to obligate the bank by the receipt of general deposits.[7] This is true, although they are received on account of a third party.[8]

It is equally clear, that he also has the power to apply its funds to the payment of the checks of its depositors. Indeed, if the cashier should pay to a *bona fide* holder the amount of a forged check drawn on the bank, or of forged notes of the bank, the payment could not be recalled; for he is trusted by the bank with an implied authority to decide on the genuineness of the handwrittng of the drawer of the check, and of the paper of the bank.[9]

Power to Issue Checks.—It is an unquestioned power of the cashier to issue checks upon the funds of the bank deposited elsewhere; and the court went to the extent, in *Northern Bank v. Johnson*,[10] of declaring that a bank is liable on a check drawn by its cashier alone, in due course of business, notwithstanding a clause in its charter providing that "all bills, bonds, notes, and every contract on behalf of the company shall be signed by the president, and countersigned and attested by the cashier; and the funds of the company shall in nowise be held responsible for any contract, unless the same be executed as aforesaid."

Power to Certify Checks.—The power of a cashier, *virtute officii*, to certify checks, was once doubted,[11] but it is now distinctly asserted that the power may be thus exercised.[12]

Power to Transfer and Indorse the Securities of the Bank.—It is an undoubted power of a cashier to transfer, and to indorse in so doing, the negotiable paper belonging to the bank, for the purpose of collection,[13] discharging its obligations,[14] making a demand or instituting a suit;[15] and, indeed, according to a great preponderance of authority, for any purpose for which a private person may transfer and indorse his individual paper, and with like effect.[16] This power, also, it has been held, may be exercised, although it be provided in the charter that the funds of the bank shall in no case be liable for any contract or engagement, unless the same shall be signed by the president and countersigned by the cashier; as such a provision does not apply to the ordinary business and duties of such officer.[17]

A cashier cannot, however, without special authority, bind the bank by an official indorsement of his individual note.[18]

[5] Medomak Bank v. Curtis, 24 Me. 36; Robinson v. Bealle, 20 Ga. 275; City Bank v. Perkins, 4 Bos. 420; Payne v. Commercial Bank, 14 Miss. 24; Merchants' Bank v. State Bank, 10 Wall. 604; Caldwell v. Mohawk, etc. Bank, 64 Barb. 333; Bank of Pennsylvania v. Reed, 1 Watts & S. 101; First Nat. Bank v. Graham, 79 Pa. St. 106; Ecker v. New Windsor Bank, 59 Md. 291; Badger v. Bank of Cumberland, 26 Me. 428; Ballston Spa Bank v. Marine Bank, 16 Wis. 125.

[6] Bank of Kentucky v. Schuylkill Bank, 1 Pars. Sel. Cas. 180, 243; Hagerstown Bank v. London, etc. Soc., 3 Grant Cas. 135; Zugner v. Best, 12 Jones & Sp. 393. See, however, Merchants' Bank v. State Bank, *supra*.

[7] State Bank v. Kain, 1 Ill. 45.

[8] Town of Concord v. Concord Bank, 16 N. H. 26.

[9] Bank of United States v. Bank of Georgia, 10 Wheat. 333; Merchants' Bank v. Marine Bank, 3 Gill, 96; Salem Bank v. Gloucester Bank, 17 Mass. 1.

[10] 5 Coldw., 88.

[11] Mussey v. Eagle Bank, 9 Metc. 306.

[12] Cooke v. State Nat. Bank, 52 N. Y. 96; Farmers, etc. Bank v. Butchers and Drovers' Bank, 16 N. Y. 125. However, compare Merchants' Bank v. State Bank, 10 Wall. 604.

[13] Elliott v. Abbott, 12 N. H. 549: Carver v. Paul, 41 Ib. 24; Potter v. Merchants' Bank, 28 N. Y. 641.

[14] Crocket v. Young, 1 S. & M. 241; Lafayette Bank v. State Bank of Illinois, 4 McLean, 208; Everett v. United States, 6 Port. (Ala.) 166; Carey v. Giles, 10 Ga. 9; Sturgis v. Bank of Circleville, 11 Ohio St. 153; Kimball v. Cleveland, 4 Mich. 606.

[15] Hartford Bank v. Barry, 17 Mass. 94.

[16] Flickner v. Bank of United States, 8 Wheat. 338; Wild v. Passamquoddy Bank, 3 Mason, 505; State Bank of Ohio v. Fox, 3 Blatchf. 431; City Bank v. Perkins, 29 N. Y. 554; Bank of the State v. Wheeler, 21 Ind. 90; Robb v. Ross Co. Bank, 41 Barb. 586; Bank of Genessee v. Patchin Bank, 19 N. Y. 312; Harper v. Calhoun, 8 Miss. 203; Blair v. Mansfield Bank, 2 Flip. C. Ct. 111: Bank of United States v. Davis, 4 Cranch C. C. 533; Merchants' Ins. Co. v. Chavin, 8 Rob. 49; Maxwell v. Planters' Bank, 10 Humph. 507; Farrar v. Gilman, 19 Me. 440; Cooper v. Curtis, 30 Me. 488; St. Louis Perpetual Ins. Co. v. Cohn, 9 Mo. 421; Bank of N. Y. v. Bank of Ohio, 29 N. Y. 619.

[17] Merchants' Bank v. Central Bank, 1 Ga. 418; Cary v. McDougald, 7 Ib. 84; Allison v. Hubbell, 17 Ind. 559; Jones v. Hawkinson, Ib. 550.

[18] West St. Louis Savings Bank v. Shawnee County Bank, 95 U. S. 557; s. c., 3 Dill. 403.

Nor can he obligate it to a holder knowing the facts by indorsing, as its cashier, paper for the accommodation of a third party, though it may be so obligated to a subsequent *bona fide* taker.[19]

But although a cashier has power to transfer and indorse in behalf of the bank, and in the ordinary course of his duties, its negotiable securities, he cannot transfer or indorse its non-negotiable paper without special authority from the directors.[20] An exception to this rule exists, however, in the transferrence of certificates of stock and similar securities, which, it is held, may be effected by him by virtue of the office which he holds."[21]

In making the indorsement, it is not necessary that great formality be observed. While in some way it should appear to be made on behalf of the bank, and not on the individual account of the cashier, slight circumstances are enough to infer this. Thus, as somewhat of an exception to the general rule respecting signing by agent, it is sufficient to bind the bank, where the cashier writes his name on the instrument, with the addition of the name of his office merely, without writing the words "for the bank," etc.[22] So, simply the addition of the abbreviation "Cas." to the name of the cashier has been deemed sufficient to make it the indorsement of the bank;[23] as has the addition of the abbreviation "Cr."[24]

No Power to Convey or Encumber the Property of the Bank.—Neither the inherent nor the implied power of a cashier extends to the conveyance or encumbrance of its property, real or personal, other than that mentioned. Such power is reposed in the board of directors, and if it be sought to be exercised by others, the authority for it must be shown.[25] However, it is held that when the cashier assigns a certificate of sale, affixing the corporate seal, his authority to do so will be presumed, until the contrary be shown.[26] And the rule will not be carried to the extent of denying him the power to discharge a mortgage and note in the ordinary course of the business of the bank.[27]

Power to Borrow.—It is one of the implied powers of a cashier, to borrow on the general credit of the bank, funds for its use, and to emit its paper therefor.[28]

Power to Accept Bills of Exchange.—The power of a cashier to accept bills of exchange drawn on the bank, was recognized in the case of *The Farmers etc. Bank v. Troy City Bank*,;[29] but it was held in the same case, that, notwithstanding this power, he cannot accept bills of exchange, on behalf of the bank, for the accommodation, merely, of the drawers.

Power to Collect Debts—No Power to Compromise or Release.—The cashier of a bank has a general authority to superintend the collection of its notes and debts, and to make such arrangements as may facilitate that object.[30] His authority does not, however, extend so far as to justify him in altering the nature of the debt, or in changing the relation of the bank from that of a creditor to that of an agent of its debtor;[31] nor in executing a composition agreement, and release therefor;[32] nor in releasing the maker of a note, payable to and held by the bank;[33] nor in consenting to any arrangement by which the security of the bank on paper due it will be re-

[19] Bank of Genesee v. Patchin Bank, 19 N. Y. 312; Houghton v. First Nat. Bank, 26 Wis. 663.

[20] Barrick v. Austin, 21 Barb. 241; Holt v. Bacon, 25 Miss. 567.

[21] Matthews v. Massachusetts Nat. Bank, 1 Holmes, 396.

[22] Robb v. Ross County Bank, 41 Barb. 586; State Bank of Ohio v. Fox, 3 Blatchf. 431; Bank of Genesee v. Patchin Bank, 13 N. Y. 309; Bissell v. First Nat. Bank, 69 Pa. St. 415; Folger v. Chase, 18 Pick. 63; Northampton Bank v. Pepoon, 11 Mass. 287; Farmers', etc. Bank v. Troy City Bank, 1 Doug. (Mich.) 457.

[23] Bank of Genesee v. Patchin Bank, 19 N. Y. 312; Houghton v. First Nat. Bank, 26 Wis. 663.

[24] Bank of the State v. Muskingham Branch Bank, 29 N. Y. 619.

[25] Legget v. New Jersey, Manf. & Banking Co., 1 N. J. Eq. 541; State of Tennessee v. Davis, 50 How. Pr. 447; United States v. City Bank of Columbus, 21 How. 356.

[26] Bank of Vergennes v. Warren, 7 Hill (N. Y.) 91.

[27] Ryan v. Dunlop, 17 Ill. 40.

[28] Burns v. Ontario Bank, 19 N. Y. 152. See Ballston Spa Bank v. Marine Bank, 16 Wis. 125.

[29] 1 Doug. (Mich.) 457.

[30] Bridenbecker v. Lowell, 32 Barb. 9; Eastman v. Coos Bank, 1 N. H. 23.

[31] Bank of Pennsylvania v. Reid, 1 Watts & S. 101; Payne v. Commercial Bank, 14 Miss. 24; Sandy River Bank v. Merchants etc. Bank, 1 Biss. 146; Ecker v. New Windsor Bank, 59 Md. 291.

[32] Chemical Bank v. Kohner, 58 How. Pr. 267; s. c. 8 Daly, 530.

[33] Hodge v. Nat. Bank, 22 Gratt. 51; Dedham Inst. for Savings v. Slack, 6 Cush. 408.

leased or impaired.[34] Such powers are functions of the board of directors, not of an executive officer.

Power to Transfer the Bank Stock.—It is an inherent power of a bank cashier to transfer the shares of its stock on the corporate books.[35]

Admissions and Declarations of the Cashier.—The same rules apply to the admissions and declarations made by a cashier to a customer that do to any other of his acts. If they are within the scope of his ordinary duties, or are otherwise authorized, they are binding,[36] but if not, they are of no obligating effect,[37] Thus, in *Cochico Nat. Bank v. Haskell*,[38] where the cashier, on inquiry, informed the surety on one of its notes, that the same had been paid, with the intention that he should rely upon it, and the surety did so, and was prejudiced thereby, it was held that the bank was estopped to deny that the note was paid. But, on the other hand, in the case of *Mapes v. Second Nat. Bank of Titusville*,[39] where the indorser, before becoming such, was told, by the cashier, that he considered the maker, for whose accommodation the indorsement was made, perfectly good financially, and that he would be safe in making such indorsement, by which statements the indorsement was procured to be made, it was held, that although wilfully false, they did not avail to bind the bank, not being within the course of the cashier's ordinary duties.

Although money paid by the cashier to a *bona fide* holder on forged bills, or forged checks on the bank, is not recoverable, he cannot obligate the bank by his mere admissions of the genuineness of such bills or checks; nor can he by his admissions of the legality of its void debts.[40]

Power to Receive Notice.—Notice received by the cashier, in the course of the duties of his office, concerning matters pertaining to its business, is notice to the bank.[41]

Place and Time of the Act.—It is by no means essential, in all cases, that the act of the cashier be done within banking hours, or at the counter or in the office of the bank, to be of binding effect upon it.[42] Thus in *Houghton v. First Nat. Bank*,[43] it was held that his representations made within the scope of his ordinary duties are binding though made elsewhere. So, in *Bissell v. First Nat. Bank*,[44] it was decided that his indorsement made in the street, after banking hours, may bind the bank. Likewise, in *Merchant's Bank v. State Bank*,[45] it was held that the fact that a check which had been indorsed "good," was not certified by the cashier at his banking house, was no objection to the validity of the act.

Power to Receive Special Deposits.—It is an accommodation often extended by banks to their customers to receive special deposits for gratuitous keeping. If this be habitually done by the bank, it will be considered one of the powers of the cashier,[46] but otherwise not.[47]

As is perfectly familiar, the taking of such deposit, does not raise the relation of debtor and creditor, as does that of an ordinary cash deposit, but that of bailee and bailor. The bank is ordinarily only liable for gross negligence respecting it, and to this responsibility

[34] Gallery v. Albion Nat. Exchange Bank, 41 Mich. 169; Daviess County Savings Ass'n v. Sailor, 63 Mo. 24. See, however, Bank v. Klingensmith, 7 Watts, 523.

[35] Case v. Bank, 100 U. S. 446; Smith v. Northampton Bank, 4 Cush. 1, 11; Commercial Bank v. Kortright, 22 Wend. 348, 351.

[36] Gould v. Cayuga County Nat. Bank. 56 How. Pr. 505; Merchants' Bank v. Marine Bank, 3 Gill, 96; Cochico Nat. Bank v. Haskell, 51 N. H. 116.

[37] United States v. City Bank of Columbus, 21 How. 356; Bank of Metropolis v. Jones, 8 Pet. 12; Harrisburg Bank v. Tyler, 3 Watts & S. 373; Merchants Bank v. Marine Bank, 3 Gill. 96; Salem Bank v. Gloucester Bank, 17 Mass. 1, 29; Mapes v. Second Nat. Bank of Titusville, 80 Pa. St. 163; Wyman v. Hallowell & Augusta Bank, 14 Mass 58.

[38] *Supra.*

[39] *Supra.*

[40] Merchants' Bank v. Marine Bank, 3 Gill. 96; Wyman v. Hallowell Bank, 14 Mass. 58; Salem Bank v. Gloucester Bank, 17 Ib. 1.

[41] Trenton Banking Co. v. Woodruff, 2 N. J. Eq. 117; New Hope etc. Bridge Co. v. Phoenix Bank, 3 N. Y. 156; Branch Bank at Huntsville v. Steele, 10 Ala. 915; Bank of America v. McNeil, 10 Bush. 54; Gaston v. American Exchange Nat. Bank, 29 N. J. Eq. 98; Fall River Union Bank v. Sturtevant, 12 Cush. 372; Security Bank v. Cushman, 121 Mass. 490.

[42] Pendleton v. Bank of Kentucky, 1 T. B. Mon. 171, 182. See, however, Bullard v. Randall, 1 Gray, 605.

[43] 26 Wis. 663.

[44] 69 Pa. St. 415.

[45] 10 Wall. 604.

[46] First Nat. Bank v. Graham, 79 Pa. St. 106.

[47] Nat. Bank of Lyons v. Ocean Nat. Bank, 60 N. Y. 278; s. c. 19 Am. Rep. 181.

the cashier cannot add by any acts of his, unless he be specially authorized thereto.[48]

Power with Reference to Suits.—A cashier is a competent officer of the bank to authorize the institution of a suit in its behalf on its matured paper.[49]

It is not, however, within the scope of the powers ordinarily conferred on such officer, to appear and defend suits against the bank.[50] Nor is it to waive the service of a petition praying a forfeiture of its charter, or the filing of an answer which virtually confesses the forfeiture of the charter and admits the necessity of the immediate liquidation of the bank.[51] Nor, again, is it within the scope of his general powers to bind the bank to indemnify an officer for levying upon property on an execution in its favor.[52]

Akron, O. L. K. MIHILLS.

PAYMENT OF JUDGMENT AFTER JUDICIAL SALE OF LAND—INFORMATION OF SALE.

REED v. RADIGAN.

Ohio Supreme Court, Oct. 21, 1884.

Where a judgment debtor pays the judgment in full, after a sheriff's sale of his lands to satisfy it, it is error in the court thereafter to confirm such sale against the debtor's objection.

Error to the District Court of Licking County.

On the 8th of March, 1881, the sheriff of Licking County, by virtue of an order of sale issued to him from the Common Pleas Court of his county, to satisfy certain decrees which were the only liens upon certain real estate of Townsend Reed, the plaintiff in error, sold to Michael Radigan, the defendant in error, such real estate for the sum of $3,250.00, who paid the same into the hands of the sheriff. On the 10th of March, 1881, the sheriff made his report to the court of the sale. The proceedings up to and including the sale were in all respects in conformity to law. During vacation, before any motion had been filed to confirm the sale, Reed paid the decrees in full with all interests and costs. On the 5th of April, 1881, Reed filed a motion to set aside the sale, upon the ground that the decrees, with interest and costs, had been paid in full.

Thereafter, at the April term of court, 1882, this motion was overruled, and the motion of Radigan to confirm the sale was allowed, the sale confirmed, and the sheriff ordered to convey to the purchaser. The several rulings of the court, upon these motions were excepted to by Reed. The District Court on error, affirmed the judgments and rulings of the common pleas; and to reverse the judgment of affirmance the present proceedingis prosecuted.

J. B. Jones, for plaintiff in error; *Dennis & Dennis*, for defendant in error; *M. A. Daugherty*, for plaintiff in error in reply.

OWEN, J., delivered the opinion of the court:

The sale by the sheriff was made, in all respects, in conformity to the provisions of the statutes. If there was any reason why the sale should not have been confirmed, or why it should have been set aside, it is to be found in the fact that, after sale and before confirmation, the debtor, whose lands were sold, satisfied the decrees upon which they were sold.

Section 5398 (Rev. Stat.) provides that: "If, upon the return of any writ of execution, for the satisfaction of which lands have been sold, it be found by the court, on careful examination of the proceedings of the officer, that the sale has been made, in all respects, in conformity to the provisions of this title, the clerk shall be directed to make an entry on the journal that the court is satisfied of the legality of such sale, and that the officer make to the purchaser a deed for the lands," etc. It is maintained by the defendant in error, that, the proceedings having conformed to the requirements of this enactment, there was no discretion in the court, and that it was its plain duty to confirm the sale and order a deed to the purchaser; and that, having paid the purchase money in full, he became invested with an interest in the land which could not be subsequently divested by any act of the debtor or of the court. If this construction of the provision above cited is to prevail, it will follow that in all cases where the purchaser is mislead as to the title of the lands sold; in all cases where the lands are appraised at a sum far below their true value; in all cases where, without the fault of either party to the proceedings, competition in bidding is prevented, whereby the sale is at a sacrifice; where the judgment is suspended by appeal after the sale; and in a variety of cases where a confirmation of the sale will work hardship and sacrifice, the court is powerless to avert the wrong by the easy and simple means of setting aside or refusing to confirm the sale. Such a construction of the statute and of the powers of the court is not only against the common understanding of the profession, and at variance with the uniform practice of

[48] Chattahoochie Nat. Bank v. Schley, 58 Ga. 369; Foster v. Essex Bank, 17 Mass. 479; Pattison v. Syracuse Nat. Bank, 80 N. Y. 82; Lloyd v. West Branch Bank, 15 Pa. St. 172; Lancaster County Nat. Bank v. Smith, 62 Ib. 47; Scott v. Nat. Bank, 72 Ib. 471; Smith v. First Nat. Bank, 99 Mass. 605.

[49] Bristol County Savings Bank v. Keavey, 128 Mass. 298.

[50] Branch Bank at Mobile v. Poe, 1 Ala. 396.

[51] State v. Citizens Savings Bank, 31 La. Am. 836.

[52] Watson v. Benneft, 12 Barb. 196.

* S. C., 6 Ohio L. J. 198. To appear in 42 Ohio St.

the courts, but we believe it is, both upon principle and authority, untenable.

It should be borne in mind that the primary object of the sale by the sheriff is to make the money due the creditor (Rorer on Judicial Sales, § 20), and when this is accomplished, there is no substantial reason why the proceedings should go farther. The purchase money paid at a sheriff's sale is held by the officer making the sale "as security that the purchaser will fulfill his contract in case the sale shall be confirmed by the court." Welch, C. J., in Fiedeldey v. Diserens, 26 Ohio St., 31. "The power of the court is limited to a confirmation or vacation of the sale, as to which they are to exercise sound legal discretion, and in which all parties—the plaintiff, the defendant, and the purchaser—may be heard. Peck, J., in Trust Co. v. Gibbon, 10 Ohio St. 566. It will be found upon an examination of the authorities, that in States where confirmation is required, the purchaser obtains no vested rights until after the sale is confirmed, and if the confirmation (which depends upon the sound discretion of the court), is refused, the rights of the purchaser fall to the ground. Taylor v. Gilpin, 3 Met. (Ky.) 544; Hunting v. Walter, 33 Md. 60; Rorer on Judicial Sales, § 10; Sowards v. Pritchett, 37 Ill. 515; Fiedeldey v. Diserens, 26 Ohio St. 312. In the latter case it was held that: "When land is sold on execution or order of sale, and before confirmation of sale by the court, the judgment or decree is satisfied by payment to the plaintiff, and the sale is therefore set aside, the officer making the sale is not entitled to poundage on the purchase money for which the land was so sold, the same not being 'money actually made and paid,' within the meaning of the statute."

In Bassett v. Daniels, 10 Ohio Stat. 617, judgment was rendered against the defendants and an order of sale of real estate allowed. Notice of intention to appeal was entered. Sale was duly made by the sheriff under this order. The proceedings were regular. After report of the sale, the defendants perfected the appeal by bond. At the next term of court the purchasers moved for confirmation of the sale. Confirmation was refused and the purchasers prosecuted error.

The court says: "An appeal perfected suspends all proceeding upon the judgment appealed from. An order confirming a sale of lands on execution and ordering the sheriff to make a deed to the purchaser, is a part of the proceeding to enforce a judgment; and a sale of real estate made before an appeal bond is filed will not be confirmed after the appeal is perfected." If the order of confirmation is a part of the proceedings to enforce a judgment, and a proceeding which suspends the operation of the judgment will defeat the confirmation of a sale made under it, it is difficult to see why payment and satisfaction in full, which actually extinguishes the judgment, should be less operative to defeat a confirmation of the sale made under it.

Upon all the facts appearing by the record in this case, it was the duty of the court to refuse confirmation of the sale, and in its action in confirming it after the judgment had been satisfied in full, there was error.

Judgment reversed.

NON-RESIDENT DIVORCES.

GREGORY v. GREGORY.*

Supreme Judicial Court of Maine, Dec. 20, 1884.

DIVORCE.—*Maine R. S., ch. 60, § 10, Bona Fide Changes of Domicil.*—The statute of Maine which enacts that "when residents of this State go out of it, for the purpose of obtaining a divorce for causes which occurred while the parties lived here, or which do not authorize a divorce here, and a divorce is obtained, it shall be void in this State," is merely an affirmation of a general principle of law, and is not applicable to persons who abandon their residence in the State of Maine, and *bona fide* establish their domicil in another State, where they afterwards obtain a divorce.

On exceptions. The facts are stated in the opinion.

Barker, Vose and *Barker*, and *A. L. Simpson*, for plaintiff; *Josiah Crosby*, for defendant.

VIRGIN, J., delivered the opinion of the court:

Action of dower against the grantee of the demandant's late husband.

To the *prima facie* case in behalf of the demandant, the defendant interposed an alleged divorce *a vinculo* decreed to her husband by the Recorder's Court in Chicago. If sustained her right of dower is thereby cut off. Stilphen v. Houdlette, 60 Maine, 447.

The presiding justice ruled that the divorce was presumed to be legal under the evidence offered, until the contrary appeared.

Thereupon the demandant interposed the provisions of R. S., c. 60, § 10, which provides: "When residents of this State go out of it for the purpose of obtaining a divorce for causes which occurred while the parties lived here, or which do not authorize a divorce here, and a divorce is obtained, it shall be void in this State;" and introduced evidence which her counsel contended tended to bring the case within its provisions.

The defendant contended that these provisions were not applicable to a resident of this State who had *bona fide* abandoned his residence here, with no intention of returning, and had *bona fide*, established his residence in Illinois for one year (as provided by the statute of that State) prior to his application for divorce, and did not return to this State. The presiding judge, for the purposes of the trial, ruled otherwise, and submitted the case to the jury with the instruction (among others), that if they were satisfied that the demandant's husband

*S. C. 76 Maine 535, Adv. Sheets.

went out of the State for the purpose of obtaining a divorce from the demandant, for some cause alleged in this State, and that he did obtain, for some cause alleged in this State, a divorce there, then they should return a verdict for the demandant; which they did.

Was this interpretation correct?

We borrowed this statutory provision, as we have many others, from Massachusetts, and adopted it in our revision of 1841.

In 1817, the court in that commonwealth held that if a citizen of that State removed into another State, for the purpose of obtaining a divorce for a cause occurring in the former, the decree would be void there. Hanover v. Turner, 14 Mass. 227. This case was approved by our court in Harding v. Alden, 9 Maine, 140, 151.

In revising the statutes of Massachusetts in 1836, the commissioners proposed and the legislature affirmed the principle by a statute in the following language: "When any inhabitant of this State shall go into any other State or country, in order to obtain a divorce for any cause which had occurred here, and while the parties resided here, or for any cause which would not authorize a divorce by the laws of this State, a divorce so obtained shall be of no force or effect in this State." R. S., (Mass.) c. 76, § 39.

In construing this statute, Shaw, C. J., said: "The object of this statute obviously was, to prevent a species of abuse which had been practiced, by obtaining divorces in other States where the parties had no domicil, and where no cause of divorce had occurred. Hanover v. Turner, 14 Mass. 227. But it is confined to persons, inhabitants of this State, who go into other States for the purpose of obtaining clandestine and unauthorized divorces." Clark v. Clark, 8 Cush. 385.

So where a wife left her husband's house in Massachusetts, went to Rhode Island, and in a few months thereafter, on notice to her husband, obtained a divorce for his alleged cruelty, the same eminent jurist, speaking for the court, said: "Even before the revised statutes, upon general principles of justice and policy, such a divorce would have been void, partly on the ground that it was a proceeding in fraud of our law, and partly because the court of the foreign State could have no jurisdiction of the subject matter and of the parties." Lyon v. Lyon, 2 Gray, 367. The court also discusses the evidence of the purpose in going to Rhode Island. See also Chase v. Chase, 6 Gray, 157, 161; Smith v. Smith, 13 Gray, 210; Shannon v. Shannon, 4 Allen, 134.

So, in a recent case, Gray, C. J., said; "When a person domiciled in this State goes, in evasion and fraud of the laws of his domicil, into another State, in order to obtain a divorce there, for a cause which had occurred here while the parties reside here, or for a cause which would not authorize a divorce by our law, it is within the power of the State, by its courts or its legislature, to declare or enact that a divorce, so obtained before acquiring a domicil in the other State, is or shall be of no force or effect in this State. This application of the general principle has been long recognized by this court, and has been repeatedly affirmed by statute," citing cases and the various revisions, and Ditson v. Ditson, 4 R. I., 87, 93; Sewall v. Sewall, 122 Mass. 156, 161.

It seems therefore that the statute is but an affirmation of the general principle of law which makes the domicil of one of the parties at least the test of jurisdiction; and the statute is predicated upon the assumption that the party leaving the State for the purpose of getting a divorce has not acquired a domicil in the other State. That such is the opinion of Gray, C. J., is made evident from the clause "before acquiring a domicil in the other State," in the foregoing quotation, thereby implying that if he does acquire "a domicil in the other State," the statute does not apply to him.

So Mr. Cooley says: "But if a party goes to a jurisdiction other than that of his domicil, for the purpose of procuring a divorce, and has residence there for that purpose only, such residence is not *bona fide*, and does not confer upon the courts of that State or country jurisdiction over the marriage relation; and any decree they may assume to make would be void as to the other party." Cooley, Const. Lim. (5th ed.) 496.

Mr. Wharton also says: "So far as this country is concerned, it is generally settled that residence without domicil will not entitle a party to sue for divorce that will bind extra-territorially. There must be a real domicil; that is to say, the domicil must be adopted as a permanency; though the fact that the object was to acquire the benefit of a more favorable type of jurisprudence does not prevent a domicil from vesting." Whar. Conf. Law. (2d ed.) § 223.

We think the terms "residents" and "go out of the State for the purpose" show that the statute was intended simply to affirm the principle of the general law, and is predicated upon the idea of the domicil remaining unchanged. A resident of any State has the undoubted right to change his domicil at will when he acts in good faith. And if his purpose be to seek the jurisdiction of his new domicil in order that he may obtain a divorce according to the laws thereof, we know of no principle of law to prevent. "Should it (the statute) be construed to be broader than the unwritten law, there is firm ground of principle for holding it to be in contravention of the Constitution of the United States." 2 Bish. Mar. & Div. §§ 199 c. 214; Ditson v. Ditson, 4 R. I. 87, 107; Harding v. Alden, *supra*.

The question in such cases is one of jurisdiction, and jurisdiction depends upon domicil. Jurisdiction of a foreign court is open whatever may be the recitals relating thereto in the judgment. Thompson v. Whitman, 18 Wall. 457; Knowles v. G. L. & C. Co., 19 Wall. 58; Sewall v. Sewall, 122 Mass. 161.

We are of the opinion that the ruling was erroneous. And as this view gives a new trial, we have no occasion to examine other points.

Exceptions sustained.

PETERS, C. J., DANFORTH, EMERY, FOSTER and HASKELL, JJ., concurred.

USURY BY NATIONAL BANKS.

BARRETT v. SHELBYVILLE NATIONAL BANK.*

Supreme Court of Tennessee, December Term, 1884.

1. *Usury—Who Entitled to Sue for.*—The provision of the National Banking Act against usury will be enforced in favor of the original borrower, or any one who, for a good cause, represents his interest.

2. ———. *Set-Off.*—The bank will be allowed to set-off the penalty by expenses of exchange, and by any just debt against the original borrower.

3. ———. State laws not applicable.

Myers & Ivie, for complainants, cited the following authorities: National Bank of Montpelier v. Hubbard, 49 Vt. 1; Bank of Bethel v. Parquoig Bank, 14 Wall. 383; Ordway v. Central National Bank, 47 Md. 217; Farmers' and Mechanics National Bank v. Dearing, 1 Otto, 22; Crocker v. National Bank of Chetopa, Thompson's National Bank Cases, 317; Tiffany v. National Bank of Missouri, 18 Wall. 409; Brandon v. Sands, 2 Ves. Jr. —; Overholt v. Monongahela National Bank, 96 Pa. 327; Overholt v. National Bank of Mt. Pleasant, 82 Pa. 490; Karmany v. National Bank of Lebanon, 96 Pa. 66; National Bank v. Trimble, 40 Ohio St. 629; Oates v. National Bank, 10 Otto, 244.

TURNEY, J., delivered the opinion of the court:

Complainant claims to be the creditor of Barrett, Landis & Co. to the amount of about ten thousand dollars; that his debtors are insolvent and have made an assignment. He charges that the Shelbyville Bank was established under the Banking Act of the United States of 1864. That Barrett, Landis & Co., between the years 1876 and 1878 did a large amount of business with the defendant bank. That the bank received from them several thousand dollars of usurious interest, the rate being one per cent. per month, in violation of the 30th sec. of the act of Congress. He seeks to be substituted to all the rights, claims and forfeitures that Barrett, Landis & Co. have under the provisions of the act of Congress to recover of the bank by reason of the taking, etc., of said usurious interest. That, in any event, he is entitled to recover of the bank the amount of usury collected contrary to the laws of Tennessee. An amended bill was filed, charging a judgment on the debt. The prayer conforms to the allegations of the bill. There were motions to dismiss and demurrers which were overruled.

The same defenses are relied on in the answer, and are, that no recovery can be had under the statutes of Tennessee; that by section 30 of the act of Congress, the right to recover is confined to the party paying the usury and his legal representative, and that a creditor is not such representative. The first question is settled in favor of the defendants in Farmers' National Bank v. Dearing, 1 Otto, 34, followed by this court in Hambright v. National Bank, 3 La. 40. Section 30 of the act of Congress of 1864, which is section 5,198 of the Revised Statutes, is as follows: "The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which note, bill or other evidence of debt carries with it, or which has been agreed to be paid. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representative, may receive back in an action, in the nature of an action of debt, twice the amount of the interest thus paid from the corporation taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred; that suits, actions and proceedings under this title may be had in any Circuit, District or Territorial Court of the United States held within the district in which such association may be established, or in any State, County or Municipal Court in the county or city in which such association is located, having jurisdiction in similar cases."

The question to answer is, Can a creditor of the borrower recover? Is he a legal representative in contemplation of the act? The construction to be given to the statute must depend upon its class. Of the one before us Justice Swayne says: "The 30th section is remedial as well as penal, and is to be liberally construed to effect the object which Congress had in view in enacting it." 1 Otto, 35. In Oates v. National Bank, 10 Otto, 244, construing an act of Congress, the court says: "The duty of the court, being satisfied of the intention of the legislature clearly expressed in a constitutional enactment, is to give effect to that intention, and not to defeat it by adhering too rigidly to the mere letter of the statute or to technical rules of construction. And we should discard any construction that would lead to absurd consequences. We ought rather, adopting the language of Lord Hale, to be curious and subtle to invent reasons and means to carry out the clear intent of the law-making power when thus expressed."

The statute makes the amount that may be recovered from the usurer a debt. The plain purpose and intent is to reimburse the borrower to the extent of the unlawful payment. The enactment is merely the declaration of a common law right, with a prescription of the form of action in which the recovery may be. If the statute had stopped short at fixing the rate of interest which might be taken, and declaring the excess unlawful, then the payor would be the creditor of the

*Will be reported in 13 Lea.

payee to the extent of the unlawful payment, which might be recovered in an action of *assumpsit* for money had and received. If it had stopped with the provision, that party paying might recover, etc., there could be no question of the right of an assignee, or executor, or trustee, or administrator, to recover, nor of the right of a creditor to impound by attachment or garnishment and appropriate the fund to the payment of a debt. The receiver of the usury is a trustee for the borrower, and a court of chancery, upon inherent principles, will make him disgorge for the benefit of creditors. The usury in the hands of the lender is as much a part of the estate of the borrower as his goods and chattels in possession, or his choses in action evidenced by notes, accounts or promises to pay. Whenever one has in his possession, or has converted in any way the money of another, no matter how obtained, to his use, the law implies a promise to pay, and upon that implied promise, debt or *assumpsit* is maintainable. The conversion, by whatever unlawful means, does not strip the estate of the true owner of its right, while the fund is in law the property of the borrower or his right to sue for its conversion exists. It is subject to condemnation for the payment of his debts. If, then the borrower or his creditors or assignee could have recovered, if the right to sue had been given alone to him, why should the addition of the words "or his personal representative" be construed to restrict to the borrower himself while in life? Would not such interpretation lead to the "absurd consequences" warned against in 10 Otto, already quoted?

To hold that the borrower may alone control a part of his estate subject to appropriation in the payment of his debts, in a way to defeat these debts by a voluntary disposition of such part, in direct violation of every rule of equity and good conscience, would be to hold that Congress had provided the debtor with sure agencies to hinder and defeat his just creditors. The declaration of the statute that the borrower may recover the usury paid, is a declaration that the receiver of that usury is the debtor to the borrower; that he holds as trustee the moneys of the borrower, or has wrongfully converted them to his own use.

The debtor defendants are insolvent and have made an assignment not embracing the chose in action sued for here, for what reason the omissions occur, does not appear. The question is, Shall this debt, due to the insolvent, and which is certainly assets for the payment of debts, be denied to creditors, simply because a bankrupt debtor fails or refuses to sue?

It certainly was not the intention of the legislature to restrict the right of recovery to the narrow limits contended for. On the contrary, we are of opinion, the term legal representative, was intended to and does mean, any one who may for a good cause, represent the interest of the original borrower, as, for instance, a purchaser from him for value, an assignee in trust for the payment of debts or a pledge. Such is the principle of the holding of Judge Dillon in Crocker v. First National Bank of Chetopa, First National Bank cases 320-1. that it was a purpose of the law to repair the loss of the borrower, or reimburse his estate, and that an assignee in bankruptcy is, in respect of such claim, which has injuriously affected and reduced the estate to bankruptcy, the legal representative of the bankrupt within the meaning of the statute.

This suit may be properly said to be the suit of the debtor firm. It is party defendant to the bill seeking the relief and asking the account. A recovery will discharge *pro tanto* its debt. A recovery is in fact and legal effect its recovery repairing its loss and reimbursing its estate. Our chancery court has the jurisdiction of the suit, and is the mode prescribed by the act.

The bank will be charged twice the amount of interest paid to or received by it in the usurious transaction with Barrett, Landis & Co. within two years before the filing of the bill, and will be credited with reasonable expenses in procuring exchange, and by any just and valid debt it may have owned on Barrett, Landis & Co., at the date of filing the bill, and which is set up by the answer and sustained by the proof.

As we have already seen the usury laws of the State cannot be applied, and, under the act of Congress, a judgment is not necessary to a recovery by a creditor of the borrower.

Therefor the demurrer to original bill should have been overruled.

WEEKLY DIGEST OF RECENT CASES.

1. AGENCY.—*Power of Insurance Agents to Make Contracts.*—Where the secretary of an insurance company "was instructed to go around and examine the risks and cancel the policies or reduce the amounts where they were considered too large," the execution of such a power as this, includes the power to make a contract with a person holding a policy, for the reduction of the policy. The power to make such contract, necessarily includes, in the absence of evidence to the contrary, the power to agree upon the terms including release, etc. *Susquehanna Mut. Fire Ins. Co. v. Brown*, S. C. Pa., Nov. 13, 1884; 15 Pittsb. Leg. J. (N. S.) 208.

2. ASSIGNMENT.—*Of a Part of a Claim or whether*

a Personal Obligation.—When an agent to sell coal lands upon a commission employed another to aid him in effecting a sale, promising to give the latter one half of his commissions in case of a sale at a given price, which sale was effected through the latter, and after the death of the former, the latter presented a claim against his estate for one half of the commissions received, it was *held* there was no equitable assignment of half of the claim for commissions, but that the relation between the two was that of creditor and debtor. *Wyman v. Snyder*, S. C. Ill., Ottawa, Nov. 17, 1884.

3. ———. *Burden of Proof.*—The burden of proof is upon a party who claims an equitable assignment of one-half of a demand to show that fact by satisfactory evidence, and this is not shown by proof of casual admissions or statements of the party holding the demand varying in form of expression and in substance, especially when rebutted by the conduct and acts of the party claiming the assignment. *Ibid.*

4. ASSAULT WITH INTENT TO RAVISH.—*Evidence of Previous Attempts.*—On trial for an assault with intent to ravish, evidence is admissible under the discretion of the judge that the defendant invited the woman, about a month previous to the assault, to walk with him to the woods; and, also, that five weeks after the assault, he followed her in the streets at night. *Commonwealth v. Bean*, S. C. Mass., Oct. 24, 1884; 18 Repr. 823.

5. ASSUMPSIT.—*Money Paid for Certain Use only.*—A had a contract with B for a supply of coal, and was unable to get sufficient money to make the advance stipulated to be paid. C had a coal contract with A, and was interested in having the said contract carried out, and handed A the money to make the tender. B refused to receive it. The contracts fell through because of the high price of coal. C demanded of A a refunding of the money. *Held*, that C could enforce his demand, with interest. *Lambert v. Short*, S. C. La , 1884; 18 Repr. 821.

6. BANKRUPTCY. — *Debt not Discharged when Merged in Judgment, etc.*—In an action on a judgment obtained after the defendant therein was adjudicated a bankrupt, and before his discharge, upon a debt provable under the bankrupt law, the original debt is merged in the judgment, and the subsequently granted certificate of discharge is no defense thereto. *Bown v. Morange*, S. C. Pa., Jan. 5, 1885; 15 Pittsb. Leg. Jour, (N. S.) 226.

7. BREACH OF PROMISE OF MARRIAGE.—*Joinder of Actions—Limitations—Seduction as Element of Damages—Minority—Justification.*—A promise to marry is a contract, for the violation of which an action lies, which is not barred by the prescription applicable to torts, but only by that applicable to suits *ex contractu*. The woman who sues cannot cumulate with her main action a demand for the recognition of the defendant as father of her child. Seduction may be shown to increase damages. Minority of defendant cannot be suggested for the first time in the appellate court. Justification must be specially pleaded to entitle defendant to prove lewd or unchaste habits of plaintiff, which cannot be shown under mere general issue. *Smith v. Braun*, S. C. of La., Jan. 19, 1885.

8. CARRIERS OF PASSENGERS.—*Accidental Destruction of Passenger's Baggage Allowed to Remain on Wharf after Delivery.*—A passenger is entitled to a reasonable time after its arrival to remove his baggage from the premises of the carrier by whom it has been transported, and during such time the carrier's liability is according to the strict rule relating to carriers. After the expiration of such reasonable time the carrier's liability is that of a warehouseman. Where, after the arrival of a passenger's baggage and a delivery, constructive or actual, thereof to the passenger, the carrier agrees to allow the baggage to remain on its wharf for the convenience of the passenger, no special contract being made as to the risk of destruction, and the baggage, while on the carrier's wharf, as aforesaid, is destroyed by fire, the passenger cannot recover against the carrier without showing that the fire was caused by its negligence. *National Line Steamship Co. v. Smart*, S. C. Pa., Nov. 10, 1884; 18 Repr. 796.

9. ———. *Unlimited Excursion Ticket.*—A passenger holding an excursion ticket, not limited on its face as to time, and who has not actual notice that it is a limited ticket can use it at his discretion. *Pennsylvania R. Co. v. Spicker*, S. C. Pa., Nov. 10, 1884; 15 Pitts. Leg. J. (N. S.) 209.

10. ———. *Connecting Lines—Whose Agent Conductor was, is a Question of Fact.*—The plaintiff in error sold a ticket over a connecting road which contained a provision that "in selling for passage over other roads this company acts only as an agent and assumes no responsibility beyond its own line." The ticket was refused by the conductor of the train on the connecting road and the passenger ejected. *Held*, that it was for the jury to say in whose employ the conductor was.—*Ibid.*

11. ———. *Passenger Ejected for not Paying Fare of Child.*—The fare of a child in charge of a passenger on a railroad train is properly chargeable to the passenger, and if the latter refuse to pay it both may be ejected from the train, though the passenger had paid his fare.—*Philadelphia, etc. R. Co. v. Hoeflick*, Md. C. of App., Oct., 1884; 18 Repr. 822.

12. COLLISIONS OF VESSELS.—*Circumstances under which Offer of Immediate Settlement Saves Costs.*—As the libellant's tug D was lying at the end of one of the piers at Jersey City outside of two canal-boats, the steam-tug P backed out of the slip above and was swung round with the ebb-tide so that her port quarter came along-side the D, causing the D to roll somewhat; and, in a few moments afterwards, the D was found leaking, with two deep cuts in her side below the water-line. *Held*, upon the evidence, that the leak was caused by cuts from the P's propeller blades, notwithstanding that the P was constructed with widely projecting guards, expressly designed to prevent the possibility of such an accident. The owners of the P, on a claim being made against them, offered to pay the bill at once, if the owners of the D would permit the P to come alongside, to test whether the blade of the P's propeller could possibly get near the D.; and, the offer not being accepted, *held*, that the request was a reasonable one having reference to an immediate settlement, and, having been refused, costs were disallowed to the libelant on recovery. *The Pennsylvania*, U. S. Dist. Ct., S. D. N. Y., Oct. 24, 1884; 22 Fed. Rep. 208.

13. CONTRACT—*Action for Breach of Parol Contract to Convey Land.*—Before an action can be brought for damages for breach of a parol con-

tract to convey land there must be an actual rescission. A parol contract for the sale of land is neither illegal nor *per se* void, but voidable only, hence, if the vendor does nothing by way of repudiation he cannot be visited with damages.—*Allison v. Montgomery*, S. C. Pa., Nov. 10, 1884; 15 Pittsb. Leg. J. (N. S.) 207.

14. CORPORATION — *Subscribers not Liable Until the Whole Capital Stock is Subscribed.*—There is no liability on a subscription to the stock of a corporation, the amount of whose capital stock is fixed, until the whole amount of the stock is subscribed. A subscriber to the capital stock of a proposed corporation when the full amount of stock required by law to be taken is not subscribed, can not be held liable individually for a debt of such corporation, unless for some cause he has estopped himself from alleging that the whole of the fixed capital stock was never subscribed. *Temple v. Lemon*, S. C. Ill., Ottawa, Nov. 17, 1884.

15. COVENANT AGAINST INCUMBRANCES.— *When Broken.*—Covenant against incumbrances is broken, if at all, when the deed is given. *Dann v. Woodruff*, S. C. Conn., 1884; 18 Repr. 780; 51 Conn.

16. CREDITOR'S BILL—*Defendant Entitled to Jury Trial on Question of Indebtedness.*—The defendant in a bill of equity by an alleged creditor, under the Massachusetts Statutes of 1875, ch. 2 5, (Pub. Stats. Mass. ch. 151, § 3.) seeking to collect his claim from one to whom it is averred he has fraudulently conveyed it, is entitled to a jury trial upon the question of his indebtedness to the plaintiff; and an issue may also properly be framed to the same jury, whether the transfer to the other defendant was fraudulent and void. *Powers v. Raymond*, S. C. Mass., Sept. 5, 1884; 18 Repr. 790.

17. ERROR AND APPEAL.—*Larceny—Proof of Corporate Existence of Owner; Necessity of Bill of Exceptions.*—Where the appellate court has jurisdiction in criminal cases of questions of law only; and a party convicted of stealing certain movable property of a railroad company appeals from the sentence imposed therefor, and bases his appeal solely on the ground that the corporate existence of such company was not proved on the trial, though averred in the indictment, it amounts in effect to a contention that he was convicted on insufficient evidence: and in the absence of a bill of exceptions taken on the trial with respect to said alleged omissions, or of any charge asked of the judge touching the effect of said omission, the appellate court is without power to inquire into the matter of fact and to consider evidence on the point when taken in lower court on a motion for a new trial. *State v. Reilly*, S. C. La., Jan. 9, 1885.

18. EVIDENCE.—*Testimony of Party Suing Estate of Deceased Person.*—Where the law allows interested parties to testify, the value of the testimony is left to the appreciation of the court, as other evidence. The testimony of a plaintiff in his own favor, to establish a large claim against the estate of one deceased, is of the weakest character, should be received with the greatest caution; and, unless strongly corroborated cannot serve as a basis of recovery. *Cutler v. Succession of Collins*, S. C. La., Jan. 19, 1885.

19. ———. *Parol to Vary Writing—Scire Facias to Revive Judgment.*—No principle has been better settled by a long line of decisions than that parol evidence is admissible to show a verbal contemporaneous agreement which induced the execution of a written obligation, though it may have the effect of varying or changing the terms of the written contract. [Miller v. Henderson, 3 S. & R., 290; Greenawalt v. Kohne, 4 Norris, 369; Barclay v. Wainwright, 5 Id. 191; Whiting v. Shippen, 8 Id. 22; Hoops v. Beale, 9 Id. 82; Keough v. Leslie, 11 Id. 424; Hartley's Appeal, 7 Out. 23; Juniata Building Association v. Hetzel, Id. 507.] In *scire facias* to revive a judgment, it is competent for defendant to show that the judgment was confessed on promise, that on the happening of a certain event it should be discharged, and that the event has happened; and such proof constitutes a good defense. *Bown v. Morange*, S. C. Pa., Jan. 5, 1885; 15 Pittsb. Leg. J. (N. S.) 226.

20. INFANTS.—*Laches not Imputable to.*—Laches will not be imputed to infants during the period of the disability. It will be imputed only from the removal of the disability. *Walker v. Ray*, S. C. Ill., Ottawa, Nov. 17, 1884.

21. INNKEEPER.—*Obligation to Receive Guest—Excuse of Want of Food—Apprehension of Insult.*—Mere apprehension of insult, is no excuse for an inn-keeper's refusal to receive a person as guest without circumstances and facts justifying such apprehension. Want of food is no excuse for an inn-keeper's failure to provide entertainment for a traveler, unless there be good excuse for such want. This rule applies to an inn-keeper who is not licensed by statute, as well as to those who are. *Atwater v. Sawyer*, S. C. Me., Dec. 27, 1884; 76 Me. 539, Adv. Sheets.

22. INSOLVENCY.—*Fraudulent Preferences under Vermont Law.*—If a debtor pays money in fraud of the insolvent law to an agent of his creditor, the assignee may recover it of the agent, although he has paid it to his principal, and no demand was made. *Larkin v. Hapgood*, S. C. Vt., Feb. Term, 1884; 56 Vt. 597 (Adv. Sheets).

23. ———. *When a Debtor is Insolvent, and when not.*—The court charged as to preferring a creditor: "Did Sawyer make the payment with a view to a preference of this defendant? What was his intent about it? If he knew, or had reason to believe, that he had not property enough to pay his debts, in either case the conclusion necessarily follows that he intended a preference;" and as to insolvency: "A solvent man is one that is able to pay all his debts in full at once, or as they become due. A man who is unable to pay his debts, out of his means, as they become due, in the ordinary course of business, or whose debts cannot be collected out of such means by legal process, is insolvent." *Held*, that it was a correct statement of the law on the subject. *Ibid.*

24. ———. ———. *Evidence of Debtor's Financial Reputation Admissible.*—In an action by an assignee to recover money paid in fraud of the insolvent law, evidence showing the debtor's financial reputation was admissible as tending to prove that the creditor had reasonable cause to believe that the debtor was insolvent, such creditor being a business man and living in the vicinity of the residence of the witnesses. *Ibid.*

25. INSTRUCTIONS.—*Jury must find "From the Evidence.*—In a suit by the personal representative of a deceased person to recover damages sustained by his widow and next of kin, the court instructed the jury on what grounds they might find for the plaintiff, and if they did then that they might give such damages as they should deem a fair and just com-

pensation, for the pecuniary loss resulting from such death, to the widow and next of kin, not exceeding $5.000: *Held*, that the instruction was erroneous, in not requiring the jury to find the damages from the evidence. *North Chicago Rolling Mill Co. v. Morrisey*, S. C. Ill., Ottawa, Nov. 17, 1884.

26. LACHES—*Excuses for Delay Must be Alleged and Shown.*—As a general rule, subject to a few exceptions, a court of chancery follows the law in applying the Statute of Limitations to cut off stale demands; and where there are exceptions a sufficient equitable excuse should be alleged and proved to account for the delay. *Walker v. Ray*, S. C. Ill., Ottawa, Nov. 17, 1884.

27. ——— *How Avoided in Equity.*—In equity, if a complainant has any grounds of exception to prevent the bar of laches, or repel the presumption arising from the delay in asserting an alleged right, the proper practice requires him to state such matters of avoidance in his bill. But under the present liberal practice as to amendments, the court may allow such matters to be brought into the case by an amendment of the bill. This equitable bar to relief cannot be avoided by proof showing an excuse for the delay, unless such excuse is alleged in the bill. In this case, a bill for the specific performance of a verbal contract to convey an interest in land was filed by the complainant about twenty-five years after the alleged contract, against a minor heir and her father, having a life estate. It failed to allege any excuse for the delay. On writ of error by the minor on arriving at lawful age, a decree against the minor heir was reversed on account of the insufficiency of the bill, it showing on its face a want of equity.—*Ibid.*

28. MANDAMUS—*To Compel Issue of Patent.*—Mandamus is the remedy to compel the commissioner of patents to issue a patent. *Butterworth v. United States*, S. C. U. S. Nov. 3, 1884; 18 Repr. 769.

29. MARRIED WOMAN—*Judgment Against on Warrant of Attorney, when Void.*—A judgment entered against a married woman on her warrant of attorney for money loaned to her, it not appearing that it was necessary for the purchase, preservation or improvement of her realty, is worthless. [The court cite: Brunner's Appeal, 11 Wright, 67; Hughes & Hacke v. Dithridge Glass Co. 15 Norris 160; Shannon v. Schultz, 6 Id., 481; Kuhns v. Turney, 6 Id., 497; Hecker v. Haak. 7 Norris, 238.] *Needham v. Woollens*, S. C. Pa., Feb. 25, 1884; s. c. 15 Pitts. L. J. (N. S.) 213.

30. MORTGAGE—*Foreclosure—Election of Remedies.*—A mortgagee employed an attorney to foreclose his mortgage and left with him the mortgage and note, and it was understood between them that the foreclosure should be by publication. The attorney followed this method, but fearing that might prove ineffectual he, in the absence and without the knowledge of the mortgagee, brought suit on the mortgage, took conditional judgment, &c. On a bill to redeem, brought by the mortgagor more than three years after the publication, but within three years from the time of entry under the writ of possession, *Held:* 1. That the second foreclosure by suit operated as a waiver of the first attempted foreclosure by publication. 2. That the attorney in bringing the foreclosure suit acted within the scope of his authority, and the mortgagee was estopped from repudiating that suit to the injury of the mortgagor. *Burgess v. Stevens*, S. C. Me., Dec. 30, 1884: s. c. 76 Me. 559 (Adv. Sheets).

31. MORTGAGE SALES.—*Sales via Executiva—Sales in Parts.*—"A mortgage creditor has an undoubted right to proceed *via executiva* notwithstanding the death of the mortgagor, and to enforce his process against the mortgaged property even when it is under administration. Gally v. Powling, 30 La. An. 323; Lamorere v. Succession of Cox, 32 Ib. 246. If he does not proceed *via executiva*, nor by application in the mortuary proceedings, the executor may initiate and perfect the sale by obtaining an order therefor as the representative of all the creditors. Succession of Hood, 33 La. An. 470. But he cannot be forced to submit to a sale of fractional parts of the property since his right attaches to the whole. Lallande v. McRae, 16 La. An. 195; Hughes v. Patterson, 23 Ib. 681. Nor can he be compelled to run the risk of diminishing the salable value of the mortgaged property by submitting to a sale, other than his mortgage contemplates, on the theory that the property if sold piecemeal will bring the amount of his mortgage, or bring more than if sold as an entirety." *Walmsley v. Levey*, S. C. La., 1884; opinion by MANNING, J.; 18 Repr. 788.

32. MUNICIPAL CORPORATIONS. — *License Fee is not a Tax.*—A license fee imposed by a city or village, in pursuance of art. 5, ch. 24, sec. 1, subdivision 91, Rev. Stat. 1874, upon certain avocations, trades, business or occupations, carried on within the corporate limits of such city or village, is not a tax within the constitutional sense of that term, and is not repugnant to sec. 1, art. 9 of the Constitution. *U. S. Distilling Co. v. City of Chicago*, S. C. Ill., Ottawa, Nov. 17, 1884.

33. ———. *Distiller's License held Valid.*—An ordinance of a city, incorporated under the general incorporation act, which provides that no person, firm or corporation shall carry on or conduct the business of brewer or distiller within the limits of the city without first paying a license therefor in the sum of $500 per annum, under a penalty of not less than $100, nor more than $200 for each and every offense, meaning that each brewery and each distillery shall pay a license fee of $500 respectively, is valid and binding. *Ibid.*

34. NEGLIGENCE.—*Instruction Ignoring Contributory.*—In an action by an administratrix to recover damages for negligence causing her husband's death, where the question of contributory negligence on the part of the deceased is fairly raised, it is error in the court to ignore entirely that question in instructing the jury. In such a case the court instructed the jury that if they believed from the evidence that plaintiff was administratrix of the estate of deceased, and that he left him surviving a widow and next of kin, who had suffered pecuniary loss by his death, and that under the instructions and evidence, the defendant is guilty as charged in the declaration, they should find for the plaintiff, etc.: *Held*, erroneous in ignoring the question of contributory negligence, and omitting the requirement of any care or caution on the part of the deceased. *North Chicago Rolling Mill Co. v. Morrissey*, S. C. Ill., Ottawa, Nov. 17, 1884.

35. PATENTS FOR INVENTIONS.—*Jurisdiction of Secretary of the Interior.*—The Secretary of the Interior has no appellate jurisdiction to pass upon the issue of a patent; the decision of the commis-

sioner of patents is conclusive upon the department, but it may be corrected by an appeal to the Supreme Court of the District of Columbia. *Butterworth v. United States*, S. C. U. S., Nov. 3, 1884; 18 Repr. 759.

36. REPLEVIN.—*When Maintained against a Widow—Evidence of Mesne Assignments.*—A plaintiff may maintain an action of replevin against a widow for property in the possession of her husband at the time of his decease. Evidence of mesne assignment showing how the title came to plaintiff is admissible in such case.—*Biemuller v. Schneider*, Md. C. of App., Oct. Term, 1884; 13 Law Rec. 139.

37. SALES OF PERSONAL PROPERTY.—*Notification of Inability to Deliver.*—In a contract of sale for the delivery of a commodity at a certain time, the vendor who notifies his vendee at about the time of delivery of his inability to fulfil his contract, relieves the latter of the legal obligation to put the vendor in default. *Camors v. Madden*, S. C. La., 1884; 18 Repr. 788.

38. ———. *Measure of Damages in Such Case.*—The defaulting vendor is liable for damages, to-wit, the difference between the stipulated price in the contract and the enhanced market price at the time of default. *Ibid.*

39. STATUTES OF LIMITATION.—*Administered on Broader Principles in Equity than at Law.*—While a court of equity as a general rule will give effect to the statute of limitations, it goes further in the interest of justice, and holds there is laches in many cases when there would be no bar to an action at law. Adverse possession of land for the statutory period of limitation under a legal title is not necessary to defeat a bill in equity, to establish an equitable title and enforce a specific performance of a verbal contract. *Walker v. Ray*, S. C. Ill., Ottawa, Nov. 17, 1884.

40. TAXATION.—*Mortgagee of Personalty takes it Free of Lien for Taxes.*—Under the statutes of Iowa, taxes are not a lien upon personalty until distraint therefor is made in the mode pointed out in the statutes; and a mortgagee of personal property who takes possession under his mortgage, and sells the property, either directly or through the decree or order of a court, before any distraint is made, is entitled to the proceeds so far as may be necessary to pay his claim as against the taxes assessed against the mortgagor.—*Maish v. Bird*, U. S. Cir. Ct., S. D. Iowa, Oct. Term, 1884; 22 Fed. Rep. 180.

41. TAX TITLE.—*Requisites to Valid Sale and Deed.*—It is a well settled rule that to sustain a tax deed a valid judgment and attested record or precept must be shown. This is indispensable to the validity of the deed. *Bell v. Johnson*, S. C. Ill., Ottawa, Nov. 17, 1884.

42. ———. *Requisites of Precepts.*—The revenue law requires the county clerk, after the judgment is entered in the judgment book, to make another record of the lands, which is a transcript of the judgment record, embracing the convening order, notice, list of the lands against which the judgment is rendered and certify that it is correct, and this attested record is the process under and by the authority of which the collector and clerk are empowered to make the sale. Without this attested copy of the judgment record there is no authority to sell. *Ibid.*

43. ———. *Canceling as a Cloud on Title.*—Where a tax deed is invalid for want of a proper precept or attested record, a court of equity has jurisdiction to declare it void, as a cloud upon the owner's title, and require the latter to refund the money paid at the tax sale and all taxes paid by the purchaser or his assignee, with legal interest. *Ibid.*

44. TRESPASS.—*Against Tax Collector—Legal List Necessary to Justification.*—A collector's justification must show a legal tax, a legal list, and that his authority was legal. *Cove Spring Iron Works v. Cone*, S. C. Vt., Feb. Term, 1884; 56 Vt. 603 (Adv. Sheets).

45. ———. *Illustration.*—The Vermont tax law of 1880 required that real estate should be appraised in 1881, and the appraisal substituted for the last quadrennial appraisal. In 1882, before the expiration of the then quadrennial period, instead of adopting the appraisal of 1881, and using such a form as the statute contemplates for making an annual list, the listers appraised the real estate and used the form for making a quadrennial appraisal. *Held*, that the list was invalid, and no justification of the collector. *Ibid.*

46. ———. *Measure of Damages in Case of Illegal Distraint by Tax Collector.*—Where goods were properly seized by a collector for non-payment of taxes, and the distress became void for an irregularity afterwards occurring in the officer's proceedings, the measure of damages, in an action of trespass for the goods by the owner against the officer, is the value of the property less the amount applied to the payment of the tax. *Cressy v. Parks*, S. C. Me., Dec. 19, 1884; 76 Me. 532.

47. WATERS.—*Riparian Rights—Highways and Bridges—Trespass upon Land of Riparian Owner.*—The owner of land upon tide water holds to low water mark subject to the public easement, as expressed in the colonial ordinance of 1641-7. A stream subject to the tide, and of sufficient size to give passage for boats, is a navigable stream, and the public has the right to boat and fish there. The leaving a boat in such stream below low water mark, is not a trespass upon the land of the riparian owner. A bridge across such stream, built and maintained for public use, resting at each end upon the land of the riparian owner, within the limits of a highway, is not his property. The fastening of a boat to such bridge, is not a trespass upon the property of the riparian owner, or upon property of which he has possession or control. A traveler as against the owner of the fee, has a right to turn from the beaten path of a highway, and use any part of it to pass and re-pass upon. A traveler has a right to approach a public water way from any part of the highway, without becoming a trespasser upon the owner of the fee. *Parsons v. Clark*, S. C. Me., Dec. 3, 1884; 76 Me. 476 (Adv. Sheets).

CORRESPONDENCE.

"JUS" RESPONDS.

Editor Central Law Journal:

It would have been far better for Mr. Alderson's position, if he had withheld his answer to my former communication. He confesses the first error charged

against him, and says, in effect, that it resulted from a mistake—possibly the printer's, possibly his own, and magnanimously takes it upon himself. In a different treatment of the second charge, he only furnishes cumulative evidence of his carelessness in reading an opinion, or his indifference about properly stating its effect.

To state the case clearly: Mr. Alderson has shown us, in his first essay, that "the act of an agent or servant, committed *under such circumstances* as to render the principal or master liable to *exemplary damages*, may be ratified; and the ratification of *such an act* may be by retaining the agent or servant in the employ of the principal, etc." This implies, and the authorities recognize, two classes of cases: 1. Where the act of the servant is intentional and malicious, so that the injured party may be entitled to exemplary, or vindictive damages. In cases of this class, the master may become liable by ratification, and his ratification may be shown by his retention of the servant in his employ. 2. Where the servant's act is one of mere negligence, without wilfulness or malice. In this class, ratification is *not* inferable from the retention in service. Now, Mr. Alderson copies from *Edelmann v. Transfer Co.*, 3 Mo., App. 503, what he says is "all of the opinion relative to the matter in question," but what is, in fact, only so much as shows that, *in that case*, the court held the retention in service as not competent to prove a ratification by the master. But he prudently omits that part of the opinion which shows that the case was one within the *second* class above mentioned; leaving the unadvised reader to infer that it belonged to the first class, wherefore the ruling was in defiance of the authorities! I here copy from the same opinion what shows conclusively that the case was one of the second class mentioned, and that therefore the decision was in exact accordance with the authorities. On page 506:

"The objection to the second instruction is well founded. The evidence in the case was not such as to call for exemplary damages, or instructions in regard to such damages. Such instructions should be strictly confined to cases where the law allows punitive damages to be given. It seems, indeed, to be true that the driver of the defendant's wagon was very careless; that there was ample room for him to pass, and that he should have looked out in time and have avoided the wagon of the plaintiff; but the mere fact that a person is very careless does not render him liable to punitive damages on account of an injury resulting from such carelessness. To justify the instruction there should have been evidence tending to show that the act was willful or intentional, or what the law considers as amounting to a willful or intentional act."

The court's conclusion upon the case presented, is what Mr. Alderson represented as *contra* the current of authority. The fact shows that it was not so. With the method of Judge Hayden's reasoning, we have nothing to do here, but it was unquestionably consistent with well established principles. Any lawyer will admit that undertaking to establish a claim for vindictive damages in the first instance, by the mere show of a supposed ratification, is a clear case of putting the cart before the horse. JUS.

QUERIES AND ANSWERS.

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

7. A justice of the peace in Texas tries and convicts a defendant of an aggravated assault and battery over his plea of not guilty, at a place in the county other than where he is required by law to hold his courts. The defendant, through ignorance, pays the fine and costs, and the next day makes a motion for a new trial, setting up the fact that the justice had no jurisdiction over the offense. Motion overruled. What recourse has the defendant? Ex.

8. Is the maternal grandmother, being a widow, of an illegitimate minor boy (fifteen years old) whose mother and putative father are both dead, a "parent" in the sense of having the right to recover from the hirer of the boy for the value of the latter's services? The case is a Tennessee case. Please answer, if possible, by issue of 20 Cent. L. J. of March 20th, 1885, at the very farthest. Th.

9. Has a notary taking depositions any judicial power? Can he commit or punish a witness for refusal to answer questions? Can he determine what questions must be answered, although the witness claims a privilege not to answer? I.

JETSAM AND FLOTSAM.

WANTS INFORMATION.—Lucius P. Little, Esq., of Owensboro, Ky., has issued a circular to his professional brethren, stating that he is going to write the life of Ben Hardin, with memoirs of his times and contemporaries, and asking for assistance in the way of sketches of old-time lawyers of the Green River Country. We hope he will get them. His task is necessarily a labor of love, and not of profit.

CHIEF JUSTICE WAITE.—We regret to state that Chief Justice Waite has been ill for some weeks. We have not able to pick out from any of our exchanges anything definite about his illness; but we learn that he is under the care of Dr. Caroline B. Winslow, a homeopathic physician. We trust it will not be thought uncharitable if we say that this fact does not promise much in favor of his speedy recovery.

FLORIDA CONSTITUTIONAL CONVENTION. — The question of calling a convention to revise the entire constitution of the State was submitted to the people of Florida at the last general election, and was carried; so that now the legislature is required to "provide by law for a convention to be holden within six months for the passage of such law; and such convention shall consist of a number of members not less than both branches of the legislature."

DIPLOMAS TO JUDGES.—About four hundred judges of election in Chicago have received diplomas for their work in the recent election, in the shape of indictments by the Grand Jury. It seems that a proposition was submitted to the people of the city to appropriate $100,000 of the saloon license fund for an additional police force upon which the people were called to vote at the last election was in reality voted down. The election returns sent in by the judges and abstracted by the County Canvassing Board showed the appropriation to have been carried. The money has been transferred to the credit of the police department, and a portion of it has been expended already in payment of the first months salary of 300 new policemen who were appointed. Now the fact is established beyond dispute, by the special Grand Jury, that the appropriation was in reality defeated; and for this, as nearly as we can gather from the daily papers, indictments have been returned.

LIGAN.—The New York *Evening Telegram* employs an imaginative gentlemen to write "anecdotes" for its readers, in the absence of more substantial pabulum. Here is something which he has evolved from his inner consciousness about our Missouri Dogberry's. It will be believed by many people "down East," who think that Missouri is still a buffalo range:—"That policeman ought to arrest himself and take himself to the station-house," said a gentleman from Missouri last evening, as he sprang backward to avoid a lurching blue-coat who was taking up the entire sidewalk on a side street not many blocks distant from the Hocking Valley benefit at the Madison Square Garden. "You may laugh at the idea of a man's arresting himself," he continued, when he and his companion had watched the convivial policeman disappear around the corner, "but I've known of such things being done often out West. Down in Southern Missouri, where I come from, we had a judge a few years ago who divorced himself. It happened at Lalla, Mo. His wife was getting a little old and faded, and the judge, who was a well-preserved man, wanted a younger companion. He made life very uncomfortable for her, and she went away to pay a visit to a sister. The judge immediately took advantage of her absence and filed a petition in his own court charging his wife with desertion. The case came up in about a month afterward, and he announced his intention of trying the case himself. His wife, for some reason, did not contest, and the judge granted himself an absolute divorce."

CROSS-EXAMINATION.—In the course of an interesting editorial upon the subject of the cross-examination of witnesses, the New York *Daily Register* says: "A vigorous and prolonged cross-examination tends to make the jury think that this witness must have said something very damaging in his direct examination to require all this effort to break him down. If he is recollected to have said anything damaging, its importance is magnified by an apparent fear on the part of cross-examining counsel to let it go unqualified; if it is not recollected, or its damaging significance was not appreciated, the more intelligent of the jury set themselves to studying out what it was, or imagining something. In either case, if the cross-examiner unluckily puts that fated question so common in one form or another on cross-examination which allows the witness to reiterate his former answer and clinch it, perhaps, with an addition, the result is to magnify and redouble the value of the direct examination, at the same time manifesting to the jury the importance which counsel attach to the subject on which they are thus discomfited. On the other hand, to omit cross-examination, or make a brief and insignificant one, tends to give the impression that no special importance is attached to the direct testimony, unless, indeed, the direct testimony was obviously damaging; and then, to omit cross-examination, suggests a fear to inquire further. A cross-examination obviously addressed to the object of breaking down or confusing the witness is likely, if vigorously conducted, to excite both antipathy and sympathy on the part of the jury. Jurors are laymen unusually not drawn from what we may call the talking classes, commonly sensible, plain-minded men, very conscious of the ability of a 'tonguey chap' to corner a plain-spoken, well-meaning one, whose intentions are better than his means of quibbling or retort. There is commonly, we suppose, one or more on the jury, whose appreciation of keenness and force, and whose enjoyment of anything in shape of a contest, will give them zeal in following counsel's attempt to confuse the average witness; but there are likely to be more on the jury, who, either from a fellow-feeling for the man who can't express himself in a manner equal to the occasion, or from a perverse and boaste[d] disposition always to 'side with the under dog,' will sympathize with the witness rather than with the counsel. This makes it important not to enter recklessly or as matter of course on an open contest with the witness; and important to succeed if an open contest is attempted."

MRS. MYRA CLARK GAINES.—This litigious person died the other day, and her portrait is now ornamenting various daily newspapers. A machine-made biography gotten up by the maker of the portrait and sent out to the various editors, is given. From this we learn the following particulars about this friend of the legal profession who fought for a generation in the courts for her title to millions: "The recent death of Mrs. Myra Clark Gaines, in New Orleans, calls to mind a sequence of facts hardly matchable in their interest. Mrs. Gaines was eighty years old when she died, and a great part of her life was spent in litigation in the courts of the United States. A little more than eighty-two years ago an Indian trader of Mississippi, Daniel Clark by name, went to Philadelphia to spend the winter in that city. While there he wooed and won as his companion, a French woman named Zulime Carrier, who had been living with a man named La Grange, also of Gallic nationality. In its opinion on the facts stated, which took place in 1805, the Supreme Court of the United States has decided that the woman was privately married to Clark, and had not been the wife of La Grange. Myra Clark, the only child of the couple subsequently declared to have been previously married, was born in the year 1806. Clark sent Zulime to New Orleans, became engaged to be married and denied that he had been married to Myra's mother. This woman returned from New Orleans, and endeavored to prove her marriage with Clark, but without success. Clark did not neglect the innocent Myra, whom he treated as a daughter and had educated with care. He resumed business as an Indian trader, making New Orleans his headquarters, and in time amassed enormous wealth. He died in 1813, and a will was produced which showed that all his fortune was left to his mother and the City of New Orleans. The executors took care of the estate, and Myra was left penniless. At twenty years of age she was married to a gentleman named Whitney. Shortly afterward she contested the will, claiming that she was the only legitimate daughter of Daniel Clark, and that the property he had left properly belonged to her. Her husband died before the trial of the suit, which she pushed with the utmost energy, and when she married Gen. Gaines, in second nuptials, he gave her his best assistance in the preparation of his wife's case. The trial came off at New Orleans, and Mrs. Gaines was defeated. She then carried her case to the Supreme Court at Washington, and was again unsuccessful. In 1852 her second husband died. Shortly after this date she found a will executed by her father, which certified that she was his only child, and creating her his sole heiress. With this document to strengthen her case, she applied to the court in New Orleans the second time, and lost, as before. In 1861, however, the Supreme Court of the United States, to which she had appealed after her defeat in the lower court, gave judgment in confirming the will she discovered in the beginning of her second widowhood, and giving her the whole property left by her father, and rents raised on it for thirty years. With the outbreak of the war came inevitable delay, and Mrs. Myra Clark Gaines died without having received from the City of New Orleans anything like the property and money to which the long-delayed favorable judgment in her suit entitled her."